Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

James Triplett,
Petitioner

vs

United States,
Respondent

Petition For Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit

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Petition For Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether or not there is basic Circuit differences as to whether defendant was denied his right to pretrial discovery, and

2. Whether or not there is basic Circuit differences as to whether there was sufficent evidence to support defendant's conviction in one Circuit versus another Circuit, and

3. Whether or not there is basic Circuit differences as to whether defendant was denied his right to information about prospective jurors' tax histories pursuant to 26 USC 6103(h)(5),and

4. Whether or not there is basic Circuit differences as to whether the various district courts evenly deny similarly situated defendants motion to suppress evidence based on US v Tweel, 550 F2d 297 (5th Cir 1977),- conducting a criminal investigation when government claims a civil function, and

5. Whether or not there is basic Circuit differences in the various district courts when dismissing of a one half of a count which would constitute a constructive amendment whereby the indictment would be considered duplicitous, and

6. Whether or not there is a basic Circuit difference in the various district courts when determining ineffective assistance of counsel, and

7. Whether or not there is a basic Circuit difference of plain error consideration in the jury instructions based upon fact that since the 1920s' the 26 USC 167 (or its prior equivalent code section numbers) has allowed a complete write off deduction of an asset when the taxpayer proves the asset(s) have become exhausted when purchased by the taxpayers, and

8. Whether or not there is a basic Circuit difference of a plain error abuse of discretion by the district courts when they deny similar situated defendants of their rights to a particularized bill of particulars, and

9. Whether or not there is a basic Circuit difference in the law by the law being uncertain and or vague to be enforceable as a criminal violation of law, and

10. Whether or not the Sixth Appellate Court denied defendant his rights under Anders vs California, by allowing counsel to withdraw before any counsel work effort has begun by counsel, and

11. Whether or not the Sixth Appellate Court abused its discretion by (a) not ordering the 41 documents that have been withheld from the defendant and (b) the district court and or the appellate court for not making either a production of the documents or an in-camera inspection of the documents, and

12. Whether or not the Sixth Appellate Court or the the district court properly order defendant to make restitution in the amount of $1,650. without allowing defendant the basic elements of due process of a full hearing as allowed by law and the US Constitution.

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Constitutional and Statutory Provisions Involved

1. Criminal Discovery
   a) Federal Rules of Crim Procedure Rule 16 - adopted by US Supreme Ct and passed by US Congress

   b) ABA Standards Sect 11-2.1 (2nd Ed 1980) (some prosecutions do provide 'open file' discovery as a local practice) - see Modern Criminal Procedure, 7th Ed (1990), p 1130

   c) II Disclosure to Accused (1970) ABA Standards, Part II Disclosure to accused, Modern Crim Procedure, 7th Ed (1990) at p 1132-1134

   d) Due Process, Criminal.
   Brady v Maryland, 373 US 83, (1963)
   US v Bagley, 473 US 667 (1985)

2. Grand Jury Composition
   a) US Constitution, 6th Amend - Right to have 'impartial jury' and 'fair cross section' for a grand jury.

   b) Federal Rule 6 (b) 'unqualified ' grand juror

   c) Federal Rule 6 (b) 'bias or prejudice' grand juror

3. Impartial and fair petit jury
   a) Composition of petit jury

   b) 26 USC 6103 (h)(5)

Jurisdiction

Statement of the Case

I James Triplett and AAAA Enterprises, Inc. had a construction contract with the Air Force in 1980 for $300,000 which should have lasted 5 months, but went 1½ years more. Defendant, was paid $60,000 more, but filed suit for $300,000 more in 1984 for more labor, and material. The IRS began its alleged civil investigation in mid 1984. Eight months of these records from mid year to March 1985 were claimed to have been stored and then destroyed after 3 years in March 1988. Those records were subpoened at trial in 1992, but were never produced based upon said excuse. Defendant was noticed of the offical criminal investigation in Sept 1985. Civil IRS employee Millard whose prime duty was to obtain the non filed returns and began his efforts in March 1985, and immediately determined defendant had committed tax evasion and had filed late returns. Later at trial in 1992 he admitted he had not seen any

elements of evasion at any time claiming he had no training in the area. He did however admit in June, 1985 he allegedly met with Criminal IRS employee Sarri who started a criminal investigation around March 1985 also, and told him criminal divison was running an investigation also. Millard claimed he had a criminal case in August and again in September, 1985 with his collection of facts on this defendant. Then his claimed civil supervisor told Millard to get more facts in August and then recommend the file to the criminal division. Millard's civil investigation file shows he was in regular contact with the criminal division in April 4, 1985 obtaining facts from that division. Further, evidence shows that he had possession of taxpayer's 1982 tax return in April, 1985 and that on June 19, 1985 IRS criminal employee Sarri had possession of the return in her written report. Millard claims he turned the file to the criminal division in September 1985. His file, as turned over to the criminal division, was subpoened for

trial in 1992 to be used by defendant as one of defendant's defense of selective prosecution, by way of vindictive prosecution of the defendant for his construction lawsuit. This evidence had (1) been destroyed and (2) not exchanged as exclupatory evidence by the government in Rule 16 pre trial evidence exchange. Defendant had issued two subpoenas at trial for this evidence. Also, the Rule 16 exchange requests and the subpoenas commanded names and addresses of informants. Millard at trial swore that criminal employee Cheryl Sarri was the informant. He swore that she had followed defendant's car in the Columbus Ohio streets and took his license number and started a criminal investigation. After the trial, and after the failure of Rule 16 and subpoenas and while defendant pursued Freedom of Information evidence, defendant located Sarri in Austin TX and called her about the truth of her being the informant and following the car. She expressly denied such a course

conduct. This confirmed the falseness of Millard's testimony of criminal Sarri's course of conduct. The defendant asked the prosecutor at trial, and demanded Sarri's whereabouts to cross examine her. He claimed he did not know her, the informant's, present address for a subpoena. There is a strong inference that Millard was using IRS criminal computers 100 feet away from his desk, to accumulate his alleged civil evidence. There can be a reasonable conclusion drawn that both the civil and criminal investigation both began in March, 1985, with full knowledge of each other's investigation. Defendant had many defenses. These facts were critical to defendant's three complete and separate defenses. They were (1) exculpatory evidence was destroyed, (2) dismissal of case based upon prosecutor's failure and misconduct to perform his at law duty of Rule 16 exchange of the name and addresses and records of Millard and Sarri, (3) dismissal of case for failure to produce the destroyed evidence and the

complete in tack file of Sarri and Millard.

'US Justice lawyer Lindsay in appeal at the circu level not only misrepresented the prosecutor's misconduct, he claimed the prosecutor not only performed the Rule 16 and the Subpoena, Brady and Bagley, the prosecutor performed the ABA Standard of 'complete open files' the Justice Department - which is contrary to Justice Department written policy - had on defendant investigations and the 'complete open files' of the IRS. It is very well settled and it is incorporated into written Justice policy that the Justice Department shall not comply with 'ABA open file rules.' And that Justice lawyers will regularly come into contact with magistrates and federal judges who will resolve a discovery trial dispute by using solely the ABA Standard. At (1) pre trial and (2) at trial and (3) at post trial (motion to produce documents) and (4) at appeal. Had defendant resided in district and or circuit that resolves disputes

with ABA Standards, this defendant reasonably could have proven the three defenses

II Many of the indictments were dismissed at trial. The sole remaining charge was depreciating two sport cars used in business and personally. Had defendant lived in the Oklahoma District where exhaustion is defined and which element must be proven to take the full exhaustion deduction, defendant's alleged crime would have been dismissed. Other districts and circuits that respect this 1968 published case also would have dismissed the charge since defendant had proven the two sports cars had in fact been exhausted according to the definition and the 'one' element. The district and circuit and the prosecutor, and defendant's own counsel did not respect said published case - and still active case precedent. Said courts and persons further did not wish to respect the IRS obvious position that the IRS ever since the 1920's to the present did not wish to publish (1) written rules or

(2) regulations or (3) Instructions for Forms to guide taxpayers upon the issue of exhausted assets. Defendant had proven at trial such car went through a 200,000 mile shake test and the cars were not to be used upon a public highway. Upon hearing such clear evidence, it was the both the duty of defendant's counsel to clearly state that such evidence required dismissal of the charge and or with such evidence both defendant's counsel and or the court should have included such evidence into the jury instructions. It is ineffective assistance of counsel and or plain error by the trial court, or both.

III In October 1990, defendant learned a grand jury was hearing evidence on tax matters of his. Defendant had no prior knowledge of what qualifications and inquiries were made to qualify each juror by the Court and what answers were given by each juror. Defendant also did not have the files of the Justice

Department prosecutor or the IRS to determine if the prosecutor had shopped around to determine which grand jury - this one or another grand grand jury - would most likely be fearful of the IRS and thereby be most ready to indict defendant on IRS charges. The US Congress had made law to prevent such happenings under 26 USC 6103 (h)(5) since the IRS was quilty previously of such conduct of. Congress assumed such conduct would continue and expressly stated that a taxpayer affected by a prospective juror's mindset of fear of the IRS from audits and investigations also become known to defendants, such as this herein defendant. Defendant, Mr Triplett, had such statutory right before the prosepective grand jury member became seated and to notice the court that such member should be disqualified as a grand jury member. Said juror could not be impartial or fair based upon his inner fears of repraisals should he/she not indict as the IRS wished.

And this would jeopardize this grand jury member's own financial structured picture. Such juror's thinking would revolve around thinking such as 'well it's him (the defendant) or me, and I will make the choice of it being the accused, not me. I bearly got through the the last IRS audit - investigation without losing everything.' This defendant's first contact prosecutor was to issue a written inquiry as to whether or not they had been audited or investigated by the IRS according to 26 USC 6103. No response was ever received. It is reasonably self evident that that this inquiry is not made by the court before a grand jury member is seated. However, it is the right of an accused before the grand jury hears any facts about an IRS case to qualify or disqualify each such prospective grand jury member. The IRS records of prospective grand jury were asked for under Rule 16 and were subpoened for trial. Nothing was produced by the prosecutor at either of the two occasions and

the court declined to rule either way on the IRS record production.

On this same issue, defendant had exercised his same informational rights about the prospective petit jurors. Upon the day of trial, defendant received the list of prospective jurors and then and there asked for audit and investigation in writing to the prosecutor. The prosecutor did nothing. The court attempted to do the IRS and prosecutor's duty by asking if each prospective member had been audited or investigated. The prosecutor and IRS did not at any time go (1) into their own files or (2) go into IRS computers and files to determine a confirmed answer if the prospective jury had been truthful. The state of the art today allows a prosecutor to find those answers within several hours accessing IRS computers and does not need the court's attention to perform such duty of the IRS or prosecutor. Congress's obvious conclusion in 26 USC 6103 was that it could not stop

such unfair one sided knowledge of the prosecutor and the IRS, but they would allow the victim of the unfairness in choosing juror to have the same knowledge of the prospective juror. It therefore is logic and reasonable and commonsense that the prosecutors and IRS still practice such conduct, and that such inquiry is already in the prosecutor and IRS files. Therefore, it takes 5 minutes only to obtain such information in the prosecutor's file. Such documents were subpoened, but never produced for trial or post trial proceedings by defendant.

IV On this issue of suppression of evidence, defendant relies upon the failure of the prosecutor to perform document exchange or subpoena records that were in the files of of the prosecutor and IRS, and never tendered as exculpatory evidence for defendant - see above # I statements of the case. The failure to know the alleged informant before trial

should have impeached the perjury of Millard as to how the criminal investigation(s) started and how civil and criminal employees jointly conducted their facts activity within 100 feet of each other. Post trial evidence of Sarri statement of never following a car and starting a criminal investigation would tell one with commonsense that something else tripped the criminal investigation. Reasonably, it is the retaliation on defendant filing a lawsuit for more money on a construction claim.

The de novo approach the circuit used was that Millard and Ferguson had sworn they had no knowledge of a money dispute between defendant and the government until after they started an investigation. This may be plausible, but the sworn statement must come from Sarri who actually started the criminal investigation and has stated Millard was lying when he said she followed a car and started an investigation. Further, it makes sense that Millard and Ferguson are the investigators. Higher level people

such as Wash D.C. Air Force and Wash D.C. IRS would have the complicity. Millard and Ferguson are merely following orders from higher ups. The files and testimony of Criminal Div. Sarri would make the connection between Washington and Columbus, Ohio, since she clearly denies that she was following the car Millard sworn testimony. After she denied following the car, she called Columbus from Austin TX and thereafter refused to discuss further what the truth of the matter was. Placing her under oath at trial as the informant was not available to defendant because of what happened in the discovery stated above in part I above. Defendant did not know her name until the first day of trial. And did not know her address and telephone number until defendant pursued in post trial his rights under the Freedom of Information Act. Had defendant resided in the 5th Circuit or had resided in a cirucit that respects the Tweel case this charge reasonably

would have been dismissed. Tweel relies solely upon IRS employee(s) testimony and their documents production to a defendant. In this instance material false testimony was given and over 241 documents at least have been withheld. And many documents have been knowingly destroyed after the audit took on the criminal features.

V Defendant had filed a motion to arrest judgment in post trial proceedings for the reasoning that the court dismissed parts of the indictment that constituted duplicity which is not allowed. This issue has been adequately addressed in Argument for a Writ. Please see the facts and law in that argument.

VI On the issue of ineffective assistence of counsel, the circuit has declined to rule upon the issue until defendant has filed a habeas petition. However, defendant believes this Court upon knowing the facts and elements required in this case can summarily dismiss this case based upon ineffective assistance of counsel. This

defendant purchased two cars and they were by law and fact exhausted. Defendant used them in business and personally. The businesses he conducted had the rights according to tax law - 26 USC 167 - to deduct in full such exhausted assets. Defendant did deduct such assets in full amounting to $15,700. The one element defendant had to prove was that the cars had ungone exhaustion before they had been purchased by defendant. This proof has been never been disproved by anyone. In both, 1984 and presently in 1995, a sole proprietorship has been allowed to provide as a non-cash fringe benefit to its work force, including family members of the work force member, a car for (1) business use or (2) 100% personal use or (3) a combination of business and personal use. Defendant had two lawyers who did not believe the IRS law reads this way. They regularly were noticed to correct their thinking. They believed the tax prosecutor since he was a tax prosecutor

and tax lawyer. The prosecutor convinced the trial court and, it was claimed that the court judge was a tax expert lawyer before becoming a judge. And by this erroneous thinking had convinced a jury as well that this deduction was not allowable by defendant. Defendant's two lawyers were duty bound to minimally know the law based upon the facts they had and advocate this position for defendant. Defendant's case should not have to prove his innocence to show ineffective assistance of counsel. The two lawyers should not have respected the court and prosecutor's alleged superior tax knowledge and they should have reasonably known the law after defendant had explained the law and facts to them. Or they should have taken the same law and facts and disproved defendant's construction.

VII Defendant in spite of the obstacles explained above in Part VI, defendant did testify that the cars were correct tax deductions in the proper amount of $15,700.. Since it was

defendant's facts and beliefs of the law, it was plain error for the defendant two' lawyers and or court to not put a clear concise jury instruction on the law of defendant's position. In order for the reader of this error to decide if the defendant's claimed plain error in all respects to the facts and the law, the reader must take a very serious and honest de novo position the circuit did not take. At least one of the forty Supreme Court reviewers should know a business self employed person in D.C. that their business provides the person with car for business or personal use or both in 1995. Now the issue is not that they report this non-cash wage and or fringe benefit, but whether or not it is allowable for the business to deduct the asset in the business. The issue further is not whether or not the person had to report the wages or fringe benefit of the car use because the indictment does not make that an issue - see circuit decision. However, the non-cash wage in 1995 is taxable income, but in

1984 it was not taxable income. This becomes significant now in 1995 because there is no tax savings advantage for the worker to be provided a business and personal car use. All personal use is taxable income. In 1984 it was not the case. The irony is that this case has been tried with the 1986 to present reform act law. Only the 1984 law applies. In 1984 a business could provide a worker a car and that car was deductible as an asset and the subject of writing a depreciation (and exhaustion) tax deduction for that business. The indictment clearly reads defendant took a $15,700. deduction when he knew he should have taken less. Please note it fails completely to state defendant should reported the cars as taxable income upon his income tax return. It may be seriously considered that the indictment was basically defective since the jury took that aspect of the facts and reached the conclusion that no depreciation was allowed because he did not report the non cash wages and fringe benefit as taxable

income. However, there was no cautionary jury instructions by defendant's two lawyers or the court to prevent such elemental injustice. The circuit suggests in its decision that defendant waived such right and they can find no plain error. The transcript however has overwhelming evidence that this plain error existed and still exists. The prosecutor, the court, and defendant's two lawyers did not believe that in 1984 a car can be provided by the business and the worker did not have to report the non cash wage and or fringe benefit as taxable income upon his tax return. The inference question therefore becomes the main point - Why then is there the Reform Act of 1985 and 1986 and 1987? These acts spell out these perks and or non cash wages and or fringe benefits will not be allowed as of this and that stated year. Cars shall be taxable income if used for any non business personal use. Even with all the reform, a business

presently can provide a car for personal use and deduct depreciation of that asset upon the business's tax return in 1995. This circuit's de novo review makes no common-sense since it applies the law after 1984 and applies it in 1984. No other circuit would make such an elemental ruling. This ruling is contrary to all other circuits since it has applied current law retro-actively. And the reform laws - no where - recite such retroactive authority. This plain error should have and could have been prevented by all the bar members at trial by the simple jury instruction that has been made an issue by defendant herein that caused this plain error that other circuits would have prevented in their de novo review. prevented.

VIII Defendant made a motion for a bill of part-iculars asking for an exact amount defendant should have taken for depreciation. The indict-read 'he took $15,700 whereas he knew he should

have taken 'less' [depreciation]. This circuit published a case on particulars which fully described that an indictment must include what a defendant must have in an indictment - an amount the defendant took and the amount the defendant should have taken. Other circuits do not disregard their previous published cases when no new reasoning displaces the foundations the opinion was given. No new reasoning exists from the publishment to present to 'require the indictment to state a certain sum that defendant should have taken. After all, the 'less' amount could reasonably be $1 or $15,700. The particulars motion has a very serious purpose. It narrowed down what the correct amount should be. But most important, it would clearly describe exactly what the grand jury believed should be the correct amount and what facts and what law was given to them to arrive at such a correct amount. The grand jury may have been given misrepresentation of the law and of the facts to arrive at the alleged correct amount. For example, refer to

common sense in Part VII above. The grand jury in 1990 may have (in all likelihood were given) been given testimony that applies in 1990, and not what the facts and law were in 1984 on tax-income or they may have been not given any any understanding of the 1920 to present law on how depreciation by way of exhaustion can be used by a taxpayer to deduct the entire $15,700. Commonsense tells one, that they were only given the depreciation method that requires the asset to be deducted as a tax deduction over several years. The trial court and the prosecutor and circuit, however, believes that what was in the indictment was sufficient. Defendant has no method to show this US Supreme Court what facts were given the grand jury. To prove such logical and reasonable and commonsense error this defendant should be given the testimony of the rest of the non disclosed evidence that the IRS induced the grand jury to indict. A glimmer of what occured on this issue at trial is very revealing. The expert, CPA, IRS witness never

heard of 26 USC 167 exhaustion depreciation and could not explain what correct tax deduction the defendant could take under the 1920 to present exhaustion depreciation law. The bill of particulars is the remedial method to close up any gaps in what the indictment says and how the law and facts apply. In constrast to all other circuits, this circuit obviously does not and will not consistently follow its own well settled rulings. Now after the fact, it is further obvious that based upon the trial evidence that extending the asset's depreciation over several years was the law and facts given the grand jury to indict. A bill of particulars would have given defendant the facts to attack the illogical reasoning given the grand jury when they indicted. Differently said, it was a defective indictment of no value.

IX There is (1) the issue of the tax law being too vague to be constitutional and (2) the tax law being too uncertain to be enforceable. This particular case has both features. The

various circuits and this US Supreme Court have have no clarity upon this problem - see law review, Tax Lawyer, Vol 39, No 2. Since then, this herein Court has band-aided this problem with the Cheek vs US of 1991. This defendant has even used this Court's Cheek remedy error of a failure in jury instruction by the trial court to insert uncertainty and vagueness in the jury instructions, but the sixth cirucit relies on the defendant level of intelligence to understand tax law. Quite the contrary, the level of intelligence has no bearing on vague law or uncertain law. When one has reasonable reading skills and has access to the Tax Forms stating the law and IRS Form Instuctions reciting the case law and the case law examples this should be adequate in and of itself. And when there is either omission or silence in the form and instructions, one reasonably has no obligations to respond criminally to that specific law. In this instance, exhaustion/depreciation has

been on the books since 1920's. Since it is rarely used, both the Form 1040 and its Instruction have nothing on the subject except the generally used methods of depreciation. But even more important, the IRS Depreciation Pamphlet 334 has nothing on exhausted assets - but its on the tax law books to the present. These three items tend to be a notice to the taxpayer on what to do and how to do it. At trial the government expert CPA knew nothing about exhaustion and had never heard of it. The bottom line of all this, was that the government at trial force feed facts that there was no such method of writing off exhausted assets. This was taking advantage of the vagueness and uncertainty of the law. The rule therefore was that if the said CPA the trial judge never heard of exhaustion, then prosecution can capitalize on the fact that if the judge and the jury never heard of it, the defendant was not using the law as it is written, but some willful tax evasive interpretation

of the law. After all, he did not use the methods the Form, the Instructions, and the Publication noticed the taxpayer to use. This is many things, and it certainly has the features of (1) uncertainty of the law as the IRS intends the law to be, and (2) the law is constitutionally vague obviously since government CPA's have never heard of the law. Well, this 26 USC 167 has contained the write off of exhaustion from the beginning of USA tax law.

Uncertainty and constitutional vagueness in this herein case has an additional prong the government may well recite. This issue must be addressed. Fringe benefits in 1975 through 1984 lacked equal enforcement.

In 1975 through 1984 the IRS had wished to restrict fringe benefits to taxpayers by its Proposed regulation published in Sept 5, 1975 in the federal register, vol 40, no.173. An excerpt of examples it wanted to stop was the following: 'Example (9) A company provides a chaufeur-driven auto to and from work for each of its top executives. The cars also are available to the executives for trips to and from business appointments. The furnishing of such service to executives does not qualify under para (a) because the cars and chauffeurs are not primarily unrelated to the personal use by the excutives, the employer incurs substantial additional cost, and the service is limited to the highest paid executives. Under para (b) the most important relevant factors are the limitation of the chauffeur service to etc * * *' The US Congress barred such a regulation on fringe benefits until January 1, 1985 by enacting reforms - see legislative history in appendix. Very obviously, the combined personal and business use is allowable in 1984 based upon

the fact there was no laws regulating fringe benefits - see 26 USC 61 and its changes in the law for the said time period at issue

X Both lawyers for defendant were allowed by leave of the circuit court to withdraw. This herein Court prescribed the basic rules of withdrawing. The only basis the two had to withdraw was there was no appealable issues. No such written or oral issue was presented to the circuit. However, at post trial proceedings, a new trial and an acquittal was by motion presented to the trial court - see appendix herein. Presuming that a de novo review by the circuit is a critical stage, this defendant was without counsel as required by the Constitution and this Supreme Court. This 6th Circuit is the only circuit that substantially alters the Anders case. All other circuits comply with the Anders written rules as mandated.

XI Subsequent administrative and legal action under the FOIA release of records disclosed

that 41 documents were withheld by the Justice and IRS Departments. Additionally, there clearly are numerous other records (at least 200) that were sanitized that were not produced that should have been produced either by written request of defendant under Rule 16 and or the two subpoenas issued at trial and or written documents production in post trial and or circuit's de novo review where defendant made a written request for production of documents. Defendant cannot imagine that other circuits do not act upon timely made ordered documents, either for defendant's knowledge for his several defenses or an in camera review for relevance to his defenses.

XII Minimum due process requires a taxable income of $1,650. to be determined by all the amounts of reported income and all the amounts of business deductible expenses. Just the opposite occurred, the alleged income was $15,700. and the tax rate of 10.5% was applied. This comes to $1,650.00. Defendant has no written statement

of how the amount was arrived at. Defendant does have facts of net operating loss carry forward and error corrections and can readily establish he owes no tax amount. No due process opportunity was given to defendant, either imagined or implied, for defendant to respond to a $1,650. restitution amount. Even more a plain error, the amount must be stated by the trier at sentence. No such amount was stated or implied.

Twelve Arguments for Writ

1. Pretrial, Crim Rule 16: This Supreme Court's Brady v Maryland is adequate in theory, but in actual practice it has very little value for a defendant seeking exculpatory evidence in the government's files. It is now common practice for a responsible defense lawyer to file a Freedom of Information (FOIA) request and or file a court action - a one year or more process - in order for a defendant to comply with the the defendant's duty to show the criminal trial judge a 'particularized need' for certain evidence that will aid in his defenses. Most lawyers will not pursue such a methodology approach because of the enormous expense - see the extremes of the O J Simpson case at discovery - and a defense lawyer cannot use this much time to defend or there is the issue of the client's inability to afford such discovery. This lack of funds is 99.9% always the case. In the

case at hand which petitioner would generalize as normal, (and had no violence elements or witness protection problems,) this defendant (1) pursued FOIA's before trial and received no evidence, and (2) in the Rule 16 evidence exchange did not receive the informer's name and address and did not receive the document that government counsel said the case could not be considered a tax evasion case. After the fact and after the case, there are 41 (FOIA) documents in the Justice and IRS files that should have been turned over and in a timely manner before trial for defendant's defense use at trial. The law of particularized need that must be shown to the trial judge before trial by defendant does not work when the government withholds numerous records from the Rule 16 exchange - see US v Short 671 F2d 178, (6th Cir 1982) Cert denied. Many districts require an open files duty by the government in the Rule 16 exchange.

The Attorney General office in D.C. has an all circuit written policy of open files memorandum to conform to Brady and Rule 16. Very obviously in this case and

many others the internal rule is not practiced. In this case, the defendant must obtain certain government records in order for defendant to prove as five separate and independant complete defenses with the records in the government's possession--See in Appeal Order Decision 18 errors at page 1c. Even a Supreme Court decision leaning toward a more full and rigid open file disclosure, without a FOIA legal action, could very well lead to the government simply destroying the exculpatory evidence. It makes no difference whether the government witholds the evidence or destroys the evidence. It does, however, matter when a government open file procedure is used and the defendant can defeat the action in one district or circuit, but will become guilty for lack of evidence that is not produced because of not showing a particularized need. It is a most serious conflict between Brady and Short, supra and the other circuits.

In this case the government to date has still refused to produce the evidence. The evidence was not produced (a) by Rule 16, (b) by subpoena, (c) by a post trial contempt motion in the trial court, and (d) by notice to the circuit of such records (total 241) withholding in the trial court. At these four times, no in-camera procedure was used as well.

2. Circuit differences on sufficiency to convict: Many other districts and circuits would have determined there was not sufficient evidence to convict because the facts have too many plain and obvious errors. This Ohio district and circuit did not accept the other jurisdictions settled law. First, this circuit does not accept the 1968 dictum, Oklahoma Gas & Light v US, 289 F Supp 98 (DC, Okl 1968) that defines exhaustion/depreciation and determines what element(s) are necessary to prove to obtain the tax deduction. There are numerous elements to use when one cannot prove exhaustion. Conversely, there is only one (1) element to prove 'and nothing

else by the taxpayer to take the deduction.' That is, the proof that exhaustion occurred. This taxpayer, at the time of purchase, knew that the two cars had undergone a 200,000 mile road "shake test" and that they were cars used to demonstrate and, at the same time, comply with U.S. safety standards. In fact, for criminal trial purposes, defendant and the government counsel knew that a DeLorean Motor Car letter existed explicitly telling the government test agency that these exact two cars were to be disposed of in such a manner as to never allow them to be placed upon a public highway. For any prosecutor, circuit and/or district, this would be cause to dismiss the charge against defendant. Moreover, the cars must be used in a business or trade or as an investment in 1984 according to 26 USC 167. Again, to a normal prosecutor and the circuit and district court, the tax law is clear in 1984 to the present. Using as an example, a worse case scenario, defendant's

business can give non-cash wage benefits to it's employees and officers for their 100% personal use in 1984. A business in 1994 can still do the same thing. The difference for 1984 and 1994 is that the employee must report the non-cash wage as taxable income. This, however, is not the issue. The issue is: can the business deduct the non-cash wage to the employee? The answer is yes.[1] In all districts and circuits this would apply, except for this circuit and district. Furthermore, to support defendant's position, the indictment the defendant is charged with is that his business took too much car depreciation not that he failed to report the taxable non-cash wage as income. Additionally, this district and circuit does not allow non-cash wages to employees.or officers, but all other circuits and districts do allow non-cash wages. Case law, or IRS Rules and Regulations or

1 Footnote: Result- see US v Citron

U.S. Code no where supports such a result as this district and circuit postulates. Had the prosecutor not presented the fraudulent inferences, the district and circuit might well not have been mislead. Equal blame goes to defense counsel at trial since the defendant even addressed the issue into the record and that defendant was not being defended effectively or properly. If this reader is still in doubt, please read the indictment format shown in the Circuit Order in the appendix, page 1b, and compare the indictment formats where a taxpayer fails to report taxable income (i.e. personal car use) knowing the taxpayer should have reproted the taxable income. Although this district and this circuit have determined not to publish the herein Appellate Order, (to make this circuit singularly different from all other circuits), it still will be regularly cited by the unprincipled

prosecutors and accepted as case law in this circuit by the incompent defense lawyers.

3. Circuit differences for defendant's right to juror tax information/history--26 USC 6103 (h)(5): The 26 USC 6103 (h)(5) Prospective Jurors statute is interpreted differently in all the circuits. Certiorari has been denied in some of the recent cases. This writer explains why justice has not been substantially accomplished irregardless of the band-aid efforts to comply with the statute. There are two glaring plain errors that have not been addressed. First, tax prosecutors and others can access, with IRS computers in minutes, the tax audit histories of the grand jury to determine which grand jury will be most fearful of the IRS and who would be more inclined toindict. The said statute does not state if it means the grand or petit jury or both. The legislative history gives no clue

if the act means both type of jurors. The said history does, however, make direct reference to the IRS successful high prosecution rate, 90%, that all other prosecutions cannot achieve. Obviously, the IRS informers told Congress of this technique (i.e. of the IRS knowing more about the prospective jurors than the court or the defendant and defendant's counsel) which made voir dire a farce. Also, the same methodology does work in shopping for the which grand jury would be most likely to indict in an IRS case. 'Shopping' is very improper, but presently can be done by the IRS computers in one hour for each grand jury. Moreover, this writer subpoened both the IRS's computer records as to whom and when each grand and petit jury member's account had been accessed by IRS employees from the IRS computers. No computer records were ever produced by the IRS to prove or disprove this impropriety for in-camera court or defendant inspection. The prosecutor offered no statement

of whether or not he shopped for a grand jury. When the prospective jurors that gathered to become grand jurors, this defendant had these rights to make an inquiry as to whether or not they had, in fact, audited or investigated by the IRS. Ultimately, it should be noted that, this defendant had a righ to object to certain members becoming grand jury members should they hear matters that pertain to defendant's taxes. The said statute assumes the IRS is going to shop around for a grand jury until they find one suited ideally for their preferential needs. Congress fully intended to level such an unbalanced and uneven situation for all prospective jurors and defendants.

Next, the Sixth circuit has clearly stated in U.S. v spine, 945 F2d 143 (6 Cir 1991) that a trial court may voir dire such prospective petit juror, but the IRS must follow up the issue by confirming the juror's

statements. This was not done, in the least, for defendant. Said statute further states that the IRS shall be given a reasonable time to perform such duty. This writer reasonably knows that the IRS computers can access 150 prospective jurors with 5 employees in a total of 4 hours. So the Court's docket pace does not have to be considered at anytime as it was suggested. Other methods also were available based upon the IRS computer's programming. That is, it can tell if one or more IRS employee had accessed any prospective grand or petit juror. This effort was made by defendant through a subpoena, and again, resulted in a wasted effort by defendant. Without "spelling it out", a possible tax defendant must be given access to 26 USC 6103 information and the defendant must be given rights to chose ("shop" if one prefers) just the same as the IRS. A defendant has every right to know if the IRS chose or 'shopped'

for the grand jurors. Congress intended a level and an even courtroom forum and a fair trial within the reasonable limits that are practical and realistic to perform. Forum shopping is improper and the states and U.S. government enact laws and court rules to discourage everything that leads up to such conduct. Therefore, it is reversible plain error when it can be proven it has occurred.

4. Basic circuit differences in suppressing evidence when government doing a civil and criminal investigation at same time: Defendant supports his position by using the long standing case of US v Tweel, 550 F2d 297 (5th Cir 1977) where the IRS may not run a criminal investigation on defendant while, at the same time, claiming to be doing a civil investigation. .This applied before defendant trial, after, and still today. After the 1977 case, the courts have held that the evidence must be clear that the two invest-

igations were coordinating and established a partnership in wrongdoing. Defendant had subpoened those records for trial. Had defendant's subpoena been obeyed, defendant (before and during trial) would have had records disclosing that two IRS employees, one civil and one criminal, were in fact running a civil and criminal investigation at the same time. Had the documents been produced at trial, defendant would have been successful at this duty. It was only after the trial in the FOIA disclosures that most clearly the Justice department's open files policy did not work in this instance. Constitutional due process rights include confronting witnesses, as in this case. Without subpoened records, defendant could not prove clearly and convincingly that the two had worked together all along. The IRS, furthermore, withheld the criminal investigator's name until the 1st day of the trial.

Even when defendant and defendant's counsel asked for the IRS investigator's address, no one in the IRS knew her address for subpoena purposes. After trial and with FOIA, those who could have located her address, 2,000 miles away, should have been able to provide the address with the IRS computers in 10 minutes. Instead, the IRS withheld evidence from defendant once again. It must be noted that a defendant has a right to confront any witnesses. It must follow that approximately 200 documents that were covered by the subpoena should have included the two said IRS employees running a blatant violation of the Tweel restriction. These 200 documents are not the same 41 documents defendant referred to earlier. Instead, the 200 documents were documents the alleged civil employee developed during his investigation, but were never turned over in the Rule 16 exchange. Due process calls for witness confrontation, but without the

withheld documents that defendant requested through the subpoena, no real confrontation existed of the witness, as well as it being meaningful. This is material to the confrontable civil witness as well. As for the criminal witness, giving her name on the first trial was a violation of the Rule 16 exchange. After asking for a subpoenable address and in 10 minutes at the IRS computer, the address could and should have been provided for defendant to confront the criminal IRS employee for hearing on the Tweel violation. The trial court had abused its discretion because it should have carefully examined the subpoened documents more carefully or the prosecutor should have addressed each document ordered, carefully. In addition, it came to the trial court's attention that numerous material documents had been intentionally withheld by way of Rule 16 and/or the subpoena(s) by the prosecutor. The defendant had filed a

motion in contempt against the prosecutor for failing to provide material witnesses' name and address and approximately 241 documents that defendant had actual knowledge that they existed by the post conviction FOIA legal action. The catch 22 is: that defendants cannot show documents exist until the prosecutor admits the documents do exist. Or, in another legal action, defendant can prove a record exists. The Supreme Court has always recognized a fraud being practiced upon the trial court by a party. In this instance, the prosecutor and IRS witnesses running a Tweel violation. See-- other violations in these herein questions raised. There is an inconsistency in and amongst circuits to <u>activate this fraud upon the court correctional remedy</u>. This sixth circuit's recent published case will only make a justice department file investigation of the prosecutors and their witnesses only when the Russian government topples and its citizens

go rummaging thrpugh Russian government files to show the sixth circuit the trial court extradicted the wrong person for murder to Israel. The wrong person defendant had Rule 16 and had done extensive work on obtaining the justice department files--since he already knew he was the wrong person--See Demjanjuk v Petrovsky, 10F3rd 338 (6th Cir, 1993). It would be ironic that the USA would topple and the citizens would present the actual documents to prove the Tweel violations and the numerous other abuses and rule violations. Both the circuit and the district produce the many documents or do an in-camera review. The standard for causing an in-camera inspection of documents should be lowered in the sixth circuit. Or the circuit and district should be ordered that a plain error was committed and the case remanded with whatever the highest court believes to be the proper remedy for all such cases.

5. Basic circuit differences of determining indictment duplicitous: This issue of an indictment being either duplicitous or not. The sixth circuit cites several cases in exactly on point, while defendant cites a case that stands on all points of the law on 26 USC 7206 (1). False statements. Had defendant resided in the 2nd Circuit, the depreciation deduction indictment would have sus sponte been dismissed by the court when the trial court dismissed 1/2 of the other part of the 4th indictment that contained the depreciation charge. Defendant uses as authority the following:

> US v Droms (1977, Ca 2, NY) 566 F2d 361, 77-1 USTC 9260. One count indictment is duplicitous where it charges a defendant with violating 26 USC 7206 (1) by willfully subscribing under penalty of perjury a statement of financial information in connection with an IRS settlement knowing the statement to be false in two material respects, both of which were specified in the indictment.

The sixth circuit uses the following:

> (W)ithdrawal of a portion of the indictment that the evidence does not support is not an impermissible amendment, 'provided nothing is thereby added to the indictment, and that the remaining allegations charge an offense.' US v Angiulo, 847 F2d 956, 964 (1st Cir), (quoting US v Winter, 663, F2d 1120, 1120, 1139-40, 1st Cir 1981, cert denied).

and the circuit further says:

> Nor was the indictment duplicative. The allegation in a single count that an offense was committed by several means, unlike the allegation of several offenses in the same count, is permissible and does not render the count duplicative. US v Hixon, 987 F2d 1261, 1265 (6th Cir 1993).

The Fed. Crim. Rule 8, Joiner of Offenses has been approved by the US Supreme Ct, several years ago. It is defendant's opinion, opinion only, that the above diametrically opposite conclusion reached is personal views of the trier or the reviewer. The one side are generalizers on the issue, and other side are practice exactness on the issue to prevent plain errors the grand jury did not intend on what they returned as

an indictment. The madness of the issue does not stop. The above issue was called count 4. In count 2, the indictment had the exact same characteristics. In count 2, the government was caught using illegal evidence they obtained to obtain 1 part of the 2 parts of the alleged false statements. They voluntarily dismissed the 2 part indictment where the illegal evidence affected just one (1) part. The government prosecutor respected and complied with the US v Droms decision. They voluntarily dismissed the entire #2 count. This was in complete opposition to what the trier did to the 4th count. That is, when 1 part of the #4 count was dismissed for insufficient evidence, the trier left the second part (of count #4) in tact and ultimately conducted a trial based on the 1 part of the #4 count charge.

To further clarify this issue, had defendant lived in the 2nd circuit, there never

would have been any depreciation trial. Since all counts would have been dismissed in the 2nd circuit, there would be no guilty verdict on depreciation and defendant would be free of any said charges. In turn, this issue needs a definitive result by the US Supreme Court since there is clear confusion within the circuits.

6. Basic circuit differences in determining ineffective assistance of counsel for defendant - see statement of the case XI.

7. Basic circuit differences of plain error upon failure to give proper jury instructions based upon trial evidence - statement of the case and US v Cheek case.

8. Basic circuit differences in determing the need for a bill of particulars - see statement of the case and US v Marra, (1973) CA 6 Mich) 481 F2d 1196, cert denied 414 US 1004, 38 L Ed2d 240, 90 S Ct 361.

9. Basic circuit differences in the law of determining uncertainty of the law - see statement of the case and Law Review, Tax Lawyer, Vol 39, No.2.

10. Basic circuit differences in applying the Ander v California requirement of continued counsel through appeal - see statement of the case and the rule requirement of Ander case. And see the eight errors defendant's counsel raised for acquittal and new trial, but did not

make issue of these same errors as an appeal Generally, they are in this herein appendix.

11. Basic circuit differences in document production to defendant or for court's in-camera inspection - see statement of the case and US v Perlstein, 126 F2d 799, and Demjanjuk v Petrovsky, 10 F3rd 338 (6th Cir, 1993)

12. Whether basic due process right was observed in assessing $1,650, tax - see statement of the case and US v Helmsley, 941 F2d 71 (2 Cir, 1991) and Fed Crim Rule Sentencing Annotations that require an amount of restitution to be given at sentencing, and if the amount is omitted or not stated it is waived by the trier and of no merit should the trier later attempt to include the amount in the written sentence of the court.

Conclusion: The above 12 questions presented are meritorious for the reasoning given and the appropriate dismissal of the district court case should be dismissed and or the Supreme Court should remand the case for further disposition and or the confusion amongst the circuits be corrected to effect a continuity of the law so that each citizen be allowed to have the equal rights and responsibility no matter what district or circuit the citizen resides in.

Respectfully submitted,

James Triplett, Defendant

In the Supreme Court of the
United States, Washinton D.C.

Certificate of Service

I, James Triplett, do hereby state under the penalties of perjury that I mailed, 1st class mail, postage prepaid, three copies of this Petition for Writ to the following address on this 20th day of February 1995: Solicitor General, Dept of Justice, Washington D.C. 20530

James Triplett

James Triplett

APPENDIX A

No. 92-3898

United States Court of Appeals
For the Sixth Circuit

United States,
Plaintiff-Appellee

vs

ORDER
Filed: Sept 30, 1994

James Triplett,
Defendant-Appellant

NOT RECOMMENDED FOR FULLTEXT PUBLICATION
Sixdth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced

BEFORE: Kennedy and Nelson, Circuit Judges, and Wellford, Senior Circuit Judge

James Triplett appeals his conviction and sentence for one court of filing a false federal tax return in violation of 26 USC § 7206 (1). The case has been referred to panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral

argument is not needed. Fed.R. App. P. 34(a).

A four-count indictment, handed down in October charged that Triplett had willfully filed false income tax returns for the tax years 1982, 1983, amended return for 1983, and 1984. Count 4(a) specifically charged Triplett had falsely claimed a depreciation deduction or his 1984 return. The government dismissed count 2 prior to trial. A six-day jury trial was conducted as to the remaining counts. At the close of the governments case, the district court granted Triplett's motion for judgment of acquittal on counts 1,3, and 4(b), but denied his motion as to count (a).

On October 24, 1991, the jury returned a verdict of guilty as to count 4(a). Triplett motion for a new trial was denied and he was sentenced on July 16, 1992, to three years imprisonment, suspended except for 60 days. The district court further imposed three years of probation, a $10,000 fine, and $1,697 restitution. Execution of Triplett's sentence

of incarceration has been stayed pending disposition of this appeal. On appeal, Triplett, who is proceeding pro se, raises eighteen alleged trial errors: (1) the government failed to turn over exculpatory evidence to the defense, (2) the government misrepresented that exhaustion/depreciation did not occur, (3) the government misrepresented that the defendant had legal duty to use Form 4562 and its instructions regarding exhaustion and depreciation, (4) the government failed to provide the defendant with requested information regarding the grand jury's and petit jury's tax audit history, (5) the government concealed evidence on it criminal investigation under the ruse of pursuing a civil investigation, (6) the trial court erred when it dismissed only half of count 4 instead of the entire count,(7) the trial court erred by apply 26 USC 168 instead of §167 to his exhaustion/depreciation claim,

(8) the trial court lacked jurisdiction to proceed with count 4(a) after count 4(b) had been dismissed, (9) [sic] (9) (10) & (15) trial counsel rendered ineffective assistance, (11) the trial court presented jury instructions which did not comport with the law, (12) the indictment was defective because it failed to state the correct depreciation amount, (13) the trial court erred by not ordering the government to produce all possible 'retaliative evidence', (14) the trial erred by not dismissing the charge because this area of law is uncertain, (16) the trial court erred by not ordering the government to provide every item on the defendant's subpoena, and (18) the trial court erred in setting restitution at $1,650 because that amount has no relation to any amount the government may have claimed as a loss. A motion to withdraw filed by Triplett's counsel was granted by this court's order February 14, 1994. Upon careful review,

we affirm the district court's judgment because none of the alleged trial errors warrants relief and the amount of restitution imposed is not arbitary but is directly related to the loss suffered by the government due to Triplett's offense of conviction.

Issue One

Triplett first argues that the government failed to turn over to the defense exculpatory evidence. Specifically, he claims that the government was required to turn over grand jury testimony which would establish that the grand jury had refused to indict him for income tax evasion. This argument is meritless. The government agreed to provide transcripts of the defendant's testimony as well as transcripts of the grand jury testimony whom the government planned to call as witnesses at Triplett's trial. However, the government was not required to provide

transcripts of the testimony of persons who would not be testifying at the trial and the district court did not abuse its discretion when it denied Triplett's request for this material on the ground that he had not shown a particularized need that would warrant disclosure of such testimony. See U.S. v Short, 671 F2d 178, 184 (6th Cir), cert denied, 457 U.S. 1119 (1982).

Issues Two, Three, and Seven

Triplett's second, third, and seventh issues are related in that they claim that the government misrepresented the facts and law concerning depreciation and exhaustion. Insofar as he argues that the government erroneously misrepresented to the jury that Triplett's two DeLorean sports cars were not 'exhausted' and thus subject to total depreciation, his argument is frivolous. The condition and personal or business use of the DeLoreans were questions of fact to be determined by the jury after both

parties presented their evidence. The jury clearly believed the testimony presented by the government's witnesses on these questions. Issues of witness credibility are for the jury to decide and will not be redetermined by the court. US v Farley, 2 F.3rd 645, 652 (6th Cir), cert denied, 114 S.Ct. 649 1993); Boutros v Canton Regional Transit Auth.,997 F2d 198, 202 (6th Cir 1993). In addition, the record does not show that the government misrepresented the law concerning depreciation, exhaustion, and employee fringe benefits; and defense counsel ably cross-examined the government's witnesses to present Triplett's position.

Issue Four

Triplett's complaint that the government failed to provide written information regarding the grand jury's and petit jury's tax audit history is without merit because he was not entitled to the tax audit history

of the grand jury, and the members of the petit jury were asked during voir dire if they or their families had been audited by the IRS. This procedure substantially complied with the statute, because Triplett received the same information that he would have received had the procedure of 26 USC 6103(h)(5) been strictly followed; thus there was no prejudice to the defense. See US v Holden, 963 F2d 1114, 1116 (8th Cir),cert denied, 1132 S.Ct.419(1992); US v Spine, 945 F2d 143, 145-48 (6th Cir 1991; US v Lussier, 929 F2d 25, 29-30 (1st Cir, 1991).

Issue Five

Triplett has failed to establish that the government improperly conducted a criminal investigation under the guise of a civil investigation, and that the information obtained must, therefore, be suppressed. In order to prevail on this issue, Triplett must show by clear and convincing evidence that the revenue

officer who conducted the civil investigation affirmatively misrepresented the nature of the investigation. See US v Burton, 724, 724 F2d 1283, 1288 (7th Cir 1984); US v Nuth, 605 F2d 229, 234 (6th Cir 1979). Triplett has not done so.

Issues Six and Eight

Triplett next asserts that the district court committed 'plain error' in dismissing only half of count 4, which charged that Triplett filed a false 1984 tax return by claiming a false deduction for repairs, and that the court lacked jurisdiction to proceed with the remaining half of count 4, which related to the depreciation deduction. He argues that count 4 constituted only one felony, and that by 'splitting' the count, the court created two felonies where the grand jury found only one. Essentially, he argues that the court's action constituted a constructive amendment that rendered the indictment duplicative. This court reviews

whether there was an amendment to the indictment. US v Robison, 904 2d 365, 368 (6th Cir.), cert denied, 498 U.S. 946 (1990). An amendment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or court after the grand jury has passed upon them. Id at 369. However, it is clear that the district court did not alter the charging terms, and thus amend the indictment, in Triplett's case. Count 4(a) could clearly stand stand alone in charging the substantive elements of 7206(1). '[W]ithdrawal of a portion of the indictment that the evidence does not support is not an impermissible amendment, 'provided nothing is thereby added to the indictment, and that the remaining allegations charge an offense.'" US v Angiulo, 847 F2d 956, 964 (1st Cir 1981, (quoting US v Winter, 663 F2d 1120, 1139-40 (1st Cir 1981, cert denied, 460 US 1011 (1983) cert denied, 488

US 928 (1988)

Nor was the indictment duplicative. The allegation in a single count that an offense was committed by several means, unlike the allegation of several offenses in the same count, is permissible and does not render count duplicative. US v Nixon, 987 F2d 1261, 1265 (6th Cir, 1993)

Issues Nine, Ten and Fifteen

In these arguments, Triplett presents various grounds for his belief that he received ineffective assistence of counsel. 'As a general rule, a defendant may not raise ineffective assistance of counsel for the first time on direct appeal, since there has not been an opportunity to develop and include in the record evidence bearing on the merits of the allegations.' US v August, 984 F2d 705, 711 (6th Cir 1992) (quoting US v Wunder, 919 F2d 34,37 (6th Cir 1990) (per curiam), cert denied, 114 S.Ct 158 (1993). The preferable route for

raising such a claim is in post-conviction proceeding brought under 8 USC 2255, which allows the parties to develop an adequate record. US v Carr, 5 F3rd 986, 993, (6th Cir 1993). Accordingly, we decline to rule on these issues at this time.

Issue Eleven

Triplett argues that the trial court was obligated to instruct the jury that a taxpayer had an unlimited deduction for employee fringe benefits in 1984. However, because he did not request the trial court to give this instruction, appeal of this issue is waived except for plain error. Fed R Civ P. 30, 52(b). We find no plain error in the court's instructions.

Issue Twelve

Triplett's assertion that the indictment was defective because it did not state the correct depreciation amount is frivolous. The indictment sets out each elementof the statutory violation in order to sufficiently inform Triplett of the offense against which he was required to defend Fed R Crim P 7(c)(1); US v Salisbury, 983 F2d 1369, 1373 (6th Cir 1993). The actual amount of an allowable deduction is not an element of the offense with which Triplett was charged. Instead, the indictment adequately informed Triplett that he was charged with knowingly making a false income tax return for 1984 by claiming a $15,700 depreciation deduction. In addition, the indictment was sufficient to bar any subsequent prosecution for the same offense. Id.

Issue Thirteen

Triplett next claims that the investigation into his tax affairs was in retaliation for litigation in which he was involved through his construction company, AAAA Enterprises, Inc., relating to a contract dispute with the US Air Force. He argues

that the government improperly withheld material that would have proved this retaliation. In an order filed on October 9, 1991, and citing US v Adams, 870 F2d 1140 (6th Cir 1989), the district court found that Triplett had failed to present some evidence tending to show the existence of the essential elements of the defense of selective prosecution. Triplett still fails to rebut the affidavits submitted by both Special agents Millard and Ferguson that neither knew about Triplett's litigation with the Air Force at the beginning of their investigations. Accordingly, the district court did not err when it denied this request for documents.

lssue Fourteen

The district court did not err by not dismissing the charge against Triplett on the ground that the area of law is uncertain. Triplett's argument is based on the fact that tax law is complex. However the evidence established that Triplett did know how to properly depreciate vehicles used in his

business because he did so on his 1980 income tax return. This issue is patently baseless.

Issues Sixteen and Seventeen

The scope of discovery lies within the sound discretion of the trial court. US v Guy, 978-39 (6th Cir1992). The district court did not abuse its discretion in denying in part Triplett's motion for production of documents.

Issues Eighteen

Finally, the district court did not abuse its discretion in setting the amount of restitution. See US v Blanchard, 9 F3d 22, 24 (6th Cir 1993). The sentencing court may require the defendant to 'make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had' 18 USC § 3651. The court's figure was arrived at by calculating the additional tax owed on $15,700 -- the amount of the improperly-claimed deduction. Moreover, Triplett did not object at sentencing to this figure, which was reported on page 2 of his presentence investigation report, and so he has waived his right to appeal this

issue. See US v Lewis, 991 F2d 322, 324 (6th Cir 1993).

Accordingly, the district court's judgment, entered on August 13, 1992, is affirmed. Rule 9(b)(3), Rules of the Six Circuit.

Entered by Order of the Court by Clerk

Internal Revenue Service

Publication 525
(Rev. Nov. 80)

Taxable and Nontaxable Income

(Including Minimum Tax, Alternative Minimum Tax, and Maximum Tax)

For use in preparing
1980 Returns

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COLUMBUS, OHIO 43215
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Wages and salaries are the main source of income for most people. This publication discusses wages, salaries, and other compensation received for services as an employee. In addition, it discusses items of miscellaneous income, as well as items that are exempt from tax. Finally, it explains the minimum tax on tax preference income and the maximum tax on personal service income.

All income that is not specifically exempt is taxable. The following list shows the range of taxable income items.

- Alimony
- Annuities
- Awards
- Babysitting Income
- Back Pay
- Barter Income
- Bonuses
- Breach of Contract Damages
- Business Income
- Commissions
- Compensation for Personal Services
- Debts Forgiven
- Directors' Fees
- Dividends
- Election Precinct Officials' Fees
- Employees' Awards
- Employees' Bonuses
- Estate and Trust Income
- Executors' Fees
- Fees
- Gain from Sale of Property
- Gambling Winnings
- Hobby Income
- Illegal Income
- Interest
- Jury Duty Fees
- Lottery Winnings
- Mileage Allowance
- Military Pay
- Notary Fees
- Partnership Income
- Pensions
- Per Diem Allowance
- Prizes
- Rents
- Retirement Pay
- Rewards
- Royalties
- Salaries
- Severance Pay
- Supplemental Unemployment Benefits
- Tips and Gratuities
- Travel Allowance
- Wages

Department of the Treasury
Internal Revenue Service

Publication 525
(Rev. Dec. 85)

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For use in preparing
1985 Returns

Introduction

This publication discusses wages, salaries, and other compensation received for services as an employee. In addition, it discusses items of miscellaneous income, as well as items that are exempt from tax.

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Business Income
Commissions
Compensation for Personal Services
Debts Forgiven
Directors' Fees
Dividends
Election Precinct Officials' Fees
Employees' Awards
Employees' Bonuses
Estate and Trust Income
Executors' Fees
Fees
Fringe Benefits
Gain From Sale of Property
Gambling Winnings
Hobby Income
Illegal Income
Interest
Jury Duty Fees
Lottery Winnings
Mileage Allowance
Military Pay
Notary Fees
Partnership Income
Pensions
Per Diem Allowance
Prizes
Rents
Retirement Pay
Rewards
Royalties
Salaries
Severance Pay
Supplemental Unemployment Benefits
Tips and Gratuities
Travel Allowance
Wages

FRINGE BENEFITS

1975 -Treasury Department issued a discussion draft of proposed regs containing a number of rules on fringes, 40 Fed. Reg. 4118 (Sept 5, 1975). This was later withdrawn, 41 Fed. Reg. 5634, Dec. 28, 1976.

Public law 95-427, enacted in 1978, prohibited the Treasury Department from issuing, prior to 1980, final regulations under section 61 relating to income tax treatment of fringe benefits. That statute also prohibited the Treasury from proposing regs relating to treatment of fringe benefits under section 61, which would be effective prior to 1980.

Public law 96-167, enacted in 1979, extended the moratorium through May 31, 1981.

Public law 97-34, the Economic Recovery tax Act of 1981 extended through December 31, 1983 the moratorium.

According to the GENERAL EXPLANATION OF H.R. 4170 [Staff of Joint Committee on Taxation, 98th Cong., 2d Sess., Dec. 31, 1984] at pages 840-841, "Because of the moratorium on the issuance of fringe benefit regulations, the Treasury Department has been precluded from clarifying the tax treatment of many of the forms of noncash compensation commonly in use. As a result, the administrators of the tax law have not had clear guidelines in this area, and hence taxpayers in identical or comparable situations have been treated differently.

[P]roposed Rules *** Federal Register Vol 40, No 173, September 5, 1975, Internal Revenue Service (26 CFR Part I) Income Tax Fringe Benefits: *** The Internal Revenue Code does not provide specific rules for determining which economic benefits jprovided to employees by their employers are required to be included in gross income. *** The need to provide guidance for all taxpayers has been apparent for some time. *** Some fringe benefits, such as the provision of health insurance by an employer for his employees are excluded expressly from gross income by statute. The status of most other fringe benefits is not answered expressly by statute. *** Proposed Amendments to the Regulation. In order to provide rules relating to whether or not incidental facilities, goods, and services benefiting employees result in gross income to the employees, the Income Tax Regulations (26 CFR PART I) are amended as follows: *** [P].

Excerpt of defendant counsel filing post trial motion for acquittal and new trial on November 7, 1991

[D]efendant renews his Motion for Judgement of Acquittal for the reasons set forth in the accompanying memorandum and incorporated herein. II. In the alternative, the Defendant moves the Court to grant him a new trial for the following reasons: 1. The Court erred in denying Defendant Motion for Acquittal on Count 4 (a) made at the conclusion of the government's case and again at the conclusion of the evidence: 2. The verdict is contrary to the weight of the evidence; 3. The verdict is not supported by substantial evidence; 4. The Court erred in sustaining objections to questions addressed to the Defendant and to the witness Bruce Powell; 5. The Court erred in charging the jury and in refusing to charge the jury as requested; and 6. The defendant was substantially prejudiced and deprived of the fair trial by reason of the following circumstances:

(a) The Court erred in its response to the inquiry from the jury; and (b) The Court permitted the jury to consider 'all of the evidence,' including evidence relating to charges upon which defendant was acquitted at the close of the evidenc[e]. '/s/ Benson Wolman, Attorney for Defendant together for Douglas W Shaw, of counsel.

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[9]-2.101 American Bar Assocation Standards for Criminal Justice. The ABA Standards for Criminal Justice have not been adopted as offical policy by the Department; however, since the courts utilize the Standards in determining issues covered by them, it is recommended that all US Attorneys familiarize themselves with the[m]. * * * [i]t necessarily follows that we have been and continue to be opposed to *** the establishment of the standards such as the ABA Omnibus Standards and other pre-trial standard[s]. [A]ny disclosures by the executive branch (Justice Dept) in exces[s] [a]re within the sole discretion of the executiv[e] [I]n our opinion, judicial supervision of the executive branch in the exercise of such discretionary discovery is improper, not only as a legal proposition, but as a needless and impractical burden upon the already overtaxed judiciar[y].